Public Prosecutor v Norfaizal bin Mat (No 2)

HIGH COURT (MELAKA) — CRIMINAL TRIAL NO MT1–45–1 OF 2002
LOW HOP BING J
18 DECEMBER 2007

Criminal Law — Dangerous Drugs Act (Malaysia) — s 39B(1)(a) — Whether prosecution could invoke presumption of trafficking when presumption of possession had been made — Whether prima facie case established

Criminal Procedure — Charge — Alteration — Whether court should alter charge against accused — Whether just to alter charge in view of circumstances of case — Criminal Procedure Code s 158(1)

Criminal Procedure — Witness — Prosecution witness could not be found — Whether could admit statement by relying on s 32(1)(i) of the Evidence Act 1950 — Whether prosecution fulfilled requirements — Evidence Act 1950 s 32(1)(i)

The accused was charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') for trafficking in cannabis weighing 1036.9g ('exh P12'). Originally, both the accused and one Azril have been charged with the same offence but the charge against Azril was subsequently withdrawn. Azril was to appear as a prosecution witness. However, Azril was missing and the various attempts to trace him had proved futile. During the trial, the deputy public prosecutor attempted to adduce the statement given by Azril to the police ('ID26') under s 112(1) of the Criminal Procedure Code ('CPC'), by relying on s 32(1)(i) of the Evidence Act 1950. However, it was objected to by defence counsel on the ground of non-compliance with conditions in s 32(1)(i). Subsequently, after considering the evidence presented before the court, the judge altered the charge from one of trafficking under s 39B(1)(a) of the Act punishable under s 39B(2), to one of possession under s 6 punishable under s 39A(2) to which the accused pleaded guilty.

Held, imposing ten years imprisonment and ten strokes of whipping:

(1) Under s 32(1)(i), it was incumbent upon the prosecution to prove that Azril had made a statement in the course of an investigation or inquiry

into an offence under or by virtue of any written law; and (a) he could not be found; or (b) his attendance could not be procured without an amount of delay or expense which, under the circumstances of the case, appeared to the court unreasonable (see para 10).

(2) It was necessary for the prosecution and the police to make diligent search and reasonable exertion in order to procure Azril. Mere ignorance of the whereabouts of Azril was not sufficient to invoke s 32(1)(i). Alternatively, there must be evidence that Azril could not be procured as a witness without an amount of delay or expense which, under the circumstances of the case, appeared to the court unreasonable. On the facts, the efforts expended by the prosecution and the police were somewhat lackadaisical and lacklustre and therefore ID26 was inadmissible as evidence (see paras 12 & 15).

(3) As the accused was found to have custody or control of exh P12, the presumption under s 37(d) of the Act should be applied. Under s 37(d), the accused was deemed to have been in possession, and to have known the nature of the drug ie cannabis. In view of the presumption invoked under s 37(d), the presumption of trafficking under s 37(da) relied upon by the prosecution could not be invoked. In the circumstances, the court should have held that there was a prima facie case of possession (see paras 28–29).

(4) However, in line with s 158(1) of the CPC and in the interest of justice, the charge against the accused was altered from one of trafficking under s 39B(1)(a) punishable under s 39B(2), to one of possession under s 6 punishable under s 39A(2) (see paras 39–41).

[Bahasa Malaysia summary

Tertuduh telah didakwa di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') kerana mengedar kanabis seberat 1036.9g ('eksh P12'). Pada asalnya, tertuduh dan seorang yang bernama Azril didakwa atas kesalahan yang sama tetapi pendakwaan terhadap Azril telah ditarik balik. Azril sepatutnya hadir sebagai saksi pihak pendakwaan. Walau bagaimanapun, Azril telah hilang dan pelbagai cubaan untuk menjejakinya terbukti sia-sia. Semasa perbicaraan, pihak pendakwaan cuba mengemukakan kenyataan yang telah diberikan oleh Azril kepada pihak polis ('ID26') di bawah s 112 Kanun Prosedur Jenayah ('KPJ'), dengan bersandar pada s 32(1)(i) Akta Keterangan 1950. Walau bagaimanapun, ia dibantah oleh peguambela atas alasan ketidakpatuhan terhadap syarat-syarat di dalam s 32(1)(i). Kemudian, selepas mempertimbangkan keterangan yang dikemukakan di hadapan mahkamah, mahkamah telah mengubah pertuduhan daripada pengedaran di bawah s 39B(1)(a) Akta tersebut yang boleh dihukum di bawah s 39B(2) kepada

pemilikan di bawah s 6 yang boleh dihukum di bawah s 39A(2) yang mana tertuduh mengaku bersalah.

Diputuskan, menjatuhkan hukuman 10 tahun penjara dan 10 kali sebatan:

(1) Di bawah s 32(1)(i), adalah kewajipan bagi pihak pendakwaan untuk membuktikan bahawa Azril telah membuat kenyataan bagi tujuan penyiasatan atau siasatan terhadap kesalahan di bawah atau terhadap mana-mana undang-undang bertulis; dan (a) beliau tidak dapat ditemui; atau (b) kehadirannya tidak boleh diperolehi tanpa kelengahan atau perbelanjaan yang pada pendapat mahkamah tidak munasabah dalam hal keadaan kes (lihat perenggan 10).

(2) Adalah perlu bagi pihak pendakwaan dan polis untuk membuat pencarian yang teliti dan usaha yang munasabah dalam mencari Azril. Tiada pengetahuan tentang di mana Azril tidak mencukupi untuk menggunakan s 32(1)(i). Secara alternatif, perlu dikemukakan keterangan bahawa Azril tidak dapat diperolehi sebagai saksi tanpa kelengahan atau perbelanjaan yang dalam hal keadaan kes, pada pendapat mahkamah, tidak munasabah. Di atas fakta, usaha yang dijalankan oleh pihak pendakwaan dan polis adalah dengan kurang berhati-hati dan kurang menyerlah dan oleh itu ID26 tidak boleh diterima sebagai keterangan (lihat perenggan 12 & 15).

(3) Oleh kerana tertuduh telah didapati mempunyai milikan dan kawalan eksh P12, anggapan di bawah s 37(d) Akta tersebut seharusnya terpakai. Di bawah s 37(d), tertuduh dianggap memiliki dan mengetahui sifat dadah tersebut iaitu kanabis. Berikutan anggapan yang dibangkitkan di bawah s 37(d), anggapan mengedar di bawah s 37(da) yang disandarkan oleh pihak pendakwaan tidak boleh dibangkitkan (lihat perenggan 28–29).

(4) Walau bagaimanapun, selaras dengan s 158(1) KPJ dan demi kepentingan keadilan, pertuduhan terhadap tertuduh diubah daripada pengedaran di bawah s 39B(1)(a) yang boleh dihukum di bawah s 39B(2) kepada pemilikan di bawah s 6 yang boleh dihukum di bawah s 39A(2) (lihat perenggan 39–41).]

Notes

For a case on alteration of charge, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 966–969.

For a case on s 39B(1)(a) of the Dangerous Drugs Act (Malaysia), see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 320–446.

For a case on witness generally, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5108–5113.

Cases referred to

Hee Nyuk Fook v PP [1988] 2 MLJ 360 (folld)
Kee Lik Tian v PP [1984] 1 MLJ 306 (refd)
Leong Hong Khie v PP; Tan Gong Wai v PP [1986] 2 MLJ 206 (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273 (refd)
PP v Gan Kwong [1997] MLJU 144 (distd)
PP v James Tan [1983] 2 MLJ 173 (refd)
PP v Lam Peng Hoa & Anor [1996] 5 MLJ 405 (refd)
PP v Mogan Ayavoo [2004] 3 CLJ 623 (refd)
PP v Mohamad Fairus bin Omar [1997] 5 MLJ 57 (refd)
PP v Mohd Jamil bin Yahya & Anor [1993] 3 MLJ 702 (refd)
PP v Oh Keng Seng [1979] 2 MLJ 174 (refd)
Pendakwa Raya v Chow Kam Meng [2001] MLJU 386 (refd)
Pendakwa Raya v Norfaizal [2003] MLJU 600 (refd)
Wong Thin Yit v Mohamed Ali [1971] 2 MLJ 175 (refd)

Legislation referred to

Criminal Procedure Code ss 112, 112(1), 158(1), 159
Dangerous Drugs Act 1952 ss 2, 6, 37(d), 37(da), 37(da)(vi), 37A(1)(b), 39A(2), 39B(1)(a), 39B(2)
Evidence Act 1950 s 32(1)(i)

Abdul Rashid Daud (Deputy Public Prosecutor, Melaka State Legal Adviser's Office) for the prosecution.
Markhan Singh (Mohd Latip & Associates) for the accused.

Low Hop Bing J:

THE CHARGE

[1] The charge, as amended, alleges that on 6 February 2002, at about 5.30pm in the compound of the Petronas Station Ayer Keroh Melaka ('the Petronas station'), in the district of Melaka Tengah, in the state of Melaka, the accused was found to be trafficking in dangerous drug, to wit, cannabis weighing 1036.9g and that the accused had thereby committed an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952, punishable under s 39B(2) of the same Act ('the charge').

[2] For brevity and convenience, a reference hereinafter to a section is a reference to that section in the Dangerous Drugs Act 1952 unless the context otherwise requires.

MISSING WITNESS

[3] Both the accused and one Azril had originally been charged with the same offence under s 39B, but the charge against Azril was subsequently withdrawn. Azril was to appear as a prosecution witness. However, Azril is now missing. Attempts by the investigating officer ('SP8') to trace him on 19 June 2003 and 23 July 2003 had proved futile. A final attempt to trace Azril in Kg Pantai Dalam Kuala Lumpur on 8 April 2003 was also unsuccessful. SP8 could not remember the dates on which efforts to trace him were published in the newspapers.

[4] SP8 states that on 19 June 2003, he caused a subpoena to be served on Azril but it could not be served by the process server. This process server was not called as a witness and his investigation diary was not produced as evidence.

[5] Another attempt to serve the subpoena was made on 8 April 2003 between 2 and 4pm by SP8 together with Detective Lance Corporal 113950, but SP8 could not give Azril's address. The detective lance corporal was also not called as a witness. An advertisement allegedly inserted in a newspaper was not identified by any of the prosecution witnesses.

[6] Learned deputy public prosecutor Miss Faradziah binti Kasah relied on s 32(1)(i) of the Evidence Act 1950 ('s 32(1)(i)') and *Public Prosecutor v Gan Kwong* [1997] MLJU 144 to adduce as evidence the statement ('ID26') given by Azril to the police under s 112(1) of the Criminal Procedure Code ('s 112(1)').

[7] Mr Markhan Singh, learned defence counsel objected on the ground that the prosecution had not complied with the conditions in s 32(1)(i) and so the court should exclude ID26, citing *Public Prosecutor v Mogan Ayavoo* [2004] 3 CLJ 623 (HC); *Public Prosecutor v Lam Peng Hoa & Anor* [1996] 5 MLJ 405 (HC); and *Public Prosecutor v Mohd Jamil bin Yahya & Anor* [1993] 3 MLJ 702 (HC).

[8] I shall now examine the relevant portion of s 32(1)(i) which reads as follows:

> 32 Cases in which statement of relevant fact by person who … cannot be found, *etc*., is relevant
>
> (1) Statements, written or verbal, of relevant facts made by a person who … cannot be found … or whose attendance cannot be procured without an amount of delay or expense which under the

A circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:

(a) …;

B (b) …;

(c) …;

(d) …;

(e) …;

C (f) …;

(g) …;

(h) …;

D (i) when the statement was made in the course of, or for the purposes of, an investigation or inquiry into an offence under or by virtue of any written law;

E **[9]** The general rule of evidence requires the best evidence to be adduced. To this general rule, s 32 is an exception which permits the admissibility of hearsay as evidence, see *Public Prosecutor v Mohamad Fairus bin Omar* [1997] 5 MLJ 57 (HC); *Leong Hong Khie v Public Prosecutor; Tan Gong Wai v Public Prosecutor* [1986] 2 MLJ 206, p 208 (FC); *Wong Thin Yit v Mohamed Ali* [1971] 2 MLJ 175, p 180 (FC); and *Kee Lik Tian v Public Prosecutor* [1984] F 1 MLJ 306, p 307 (HC).

[10] In my judgment, under s 32(1)(i), it is incumbent upon the prosecution to prove that Azril has made a statement in the course of an G investigation or inquiry into an offence under or by virtue of any written law; and

(a) he could not be found; or

(b) his attendance cannot be procured without an amount of delay or H expense which, under the circumstances of the case, appears to the court unreasonable.

[11] Section 112(1) empowers a police officer making an investigation to examine orally any person supposed to be acquainted with the facts and I circumstances of the case and shall reduce into writing any statement made by the person so examined.

[12] The statement made by Azril to SP8 under s 112(1) comes within s 32(1)(i) and so is a relevant fact.

[13] It is necessary for the prosecution and the police to make diligent search and reasonable exertion in order to procure Azril, otherwise the court is unable to come to a finding that Azril could not be found, in which case, his statement is inadmissible under s 32(1)(i). Mere ignorance of the whereabouts of Azril is not sufficient to invoke the section, see *Lam Peng Hoa & Anor*, pp 413–414 per Kang Hwee Gee J.

[14] Alternatively, there must be evidence that Azril cannot be procured as a witness without an amount of delay or expense which, under the circumstances of the case, appears to the court unreasonable.

[15] In *Mogan Ayavoo*, the prosecution sought to invoke s 32(1)(i). Attempts by the police to find the missing witness through advertisements in the newspapers, sending out signals to all the police district chiefs in East and West Malaysia and tracing all known addresses of the witness were futile. Balia Yusof Wahi JC (now J) rejected the prosecution's application to admit the witness' statement under s 112 because the attempts made by the police were nothing more than sticking to their own routine procedure; and the failure of the police to locate any member of the witness' family and to interview them as well as the failure to check the witness' Sabah address clearly indicated the lack of initiative and diligence on their part.

[16] More serious effort is warranted: see *Pendakwa Raya v Chow Kam Meng* [2001] MLJU 386 per Abdul Wahab Patail J.

[17] In *Gan Kwong*, where the police had arrested one *C* together with the accused. *C* was not charged in court but was offered bail. Police could neither trace nor serve a subpoena on *C* who had earlier given a statement under s 112 to the police. Several attempts were made to trace not only *C* but also *C*'s surety. The investigation diaries of two lance corporals were tendered as exhibits to show the efforts to serve the subpoena on *C* and his surety. A third lance corporal tried to obtain the addresses of *C* and his witness from various government departments but the efforts were unsuccessful. A fourth lance corporal also attempted to serve the subpoena on the surety. Three advertisements were inserted in three separate Chinese dailies and their translations were exhibited. The bail bond was also tendered as evidence. The meticulous and strenuous efforts exerted by the police had impressed Abdul Malik Ishak J who allowed the prosecution to tender *C*'s s 112 statement under s 32(1)(i) and admitted it as evidence.

[18] However, the efforts expended by the prosecution and the police in the instant case were, with due respect, somewhat lackadaisical and lacklustre, falling even below the steps taken by their counterparts in *Mogan Ayavoo*.

Where the proceedings concern a capital charge warranting mandatory death sentence upon conviction, the court is reasonably entitled to expect more strenuous efforts of greater tenacity.

[19] In the circumstances, I am unable to admit ID26 as evidence.

INGREDIENTS OF THE CHARGE

[20] In order to establish a prima facie case of the charge, it is incumbent upon the prosecution to prove that:

(1) the substance in question is cannabis;

(2) the weight is 1036.9g; and

(3) the accused was trafficking in cannabis, either by way of direct evidence or invoking the relevant statutory presumption.

SUBSTANCE AND WEIGHT

[21] The unchallenged evidence of the chemist Mr Lim Kieng Chwee ('SP3') confirmed that the substance analysed by him was cannabis as defined under s 2 and that the weight was 1036.9g.

POSSESSION AND TRAFFICKING

[22] These ingredients require a more elaborate treatment and warrant a maximum evaluation of the evidence adduced for the prosecution. My finding of facts will now follow.

[23] On 6 February 2002 at 4.30pm, Chief Inspector Mustafa Kamal ('SP4') led two other officers and ten men to the Petronas station. At about 5.30pm, at a stall there, SP4 together with Chief Inspector (later ASP) Fauzi ('SP5'), Chief Inspector Mat Yatim ('SP6') and Detective Lance Corporal Chandrasekaran approached two male Malays. SP4 examined one of them, identified as Azril, but found nothing on him. The other male Malay, identified as the accused, attempted to flee. After a commotion, SP4 and his men arrested both of them.

[24] SP5 saw the accused holding a car key in his right hand. The accused then led SP4, SP5, SP6 and other members of SP4's police party to the accused's Proton Wira car bearing 'registration No WDR 6039' with chassis No PLIC 96 SNRYB461190 ('the Proton car') which was parked about ten metres from the stall there. The Proton car was locked. The accused used the car key to open the door to the driver's seat. Subsequently, the accused

opened the door behind the driver's seat and entered the car through that door. He then lifted the seat on the left, behind the front passenger's seat. In the presence of SP4 and the police party, the accused took out a black plastic package with the words 'Thank you for your business' ('exh P12').

[25] SP4 then administered the caution under s 37A(1)(b) of the Dangerous Drugs Act 1952, and recorded a statement from the accused.

[26] At this juncture, there was an application by the defence for a voire dire (trial within a trial) to determine the adminissibility of the cautioned statement ('ID15') given by the accused to SP4. Thereafter, I held that the statement was inadmissible (see *Pendakwa Raya v Norfaizal* [2003] MLJU 600).

[27] Reverting to the trial proper, SP4 opened exh P12 in the presence of, inter alia, the accused, and found a parcel containing compressed substance wrapped in aluminium paper and tied with a string. SP4 suspected the compressed substance to be cannabis. SP4 informed the accused, inter alia, of the offence of drug trafficking, and brought him to the Proton car, driven by Detective Lance Corporal Yahya and escorted by detective lance corporal Chandrasekaran. SP4, who seized the compressed substance, took the front passenger's seat. All of them proceeded to SP4's office in the police contingent headquarters.

[28] SP4 issued a search list to the accused who countersigned it. The list itemised:

(1) the compressed substance;

(2) exhibit P12;

(3) the car; and

(4) the car key.

[29] On the same day, at 7pm, SP4 informed SP8 of the same. When SP8 arrived at SP4's office at about 7.45pm, SP4 handed over to SP8 the items contained in the search list.

[30] Cross-examination of SP4 by the defence created no adverse effect on his evidence in chief.

[31] SP5 and SP6 who were with SP4 in the police party on 6 February 2002 corroborated SP4's evidence. The defence cross-examination had also not created any adverse effect in their respective evidence in chief.

[32] SP7 was at the material time the owner of a Sedan 3.1 Proton Wira car bearing registration number WHN 5939 ('the Proton Wira car') and the same chassis number as the Proton car. SP7's car was reported missing at Klang Jaya Jusco on 26 November 2001. He did not lend his car to anybody. He lodged a report at Klang police station. He was subsequently informed by SP8 that the Proton Wira car bearing the same chassis number has been found and that the Proton car was confirmed by SP8 as the Proton Wira car.

[33] For the purpose of proving possession and trafficking, the prosecution relied on the evidence of SP4 to SP6 and the presumption of trafficking under s 37(da)(vi).

[34] In my judgment, the issue of whether the accused was in possession of the drug in question must be established by reference to the evidence adduced at the trial. There are limitless permutations of facts and circumstances available in each particular case.

[35] As the accused was found to have custody or control of exh P12, I apply the presumption under s 37(d) which says that 'any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug'.

[36] Under s 37(d), the accused is deemed to have been in possession, and to have known the nature of the drug ie cannabis.

[37] In view of the presumption invoked under s 37(d) pertaining to possession and knowledge, the presumption of trafficking under s 37(da) relied upon by the prosecution cannot be invoked. This has been clearly stated by the then Supreme Court in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273.

[38] That being the case, in all humility, at the close of the prosecution's case, I should have held that there was a prima facie case of possession, instead of accepting the submission of the prosecution to the effect that s 37(da) could be invoked directly, without referring to s 37(d). I should have ordered the accused to answer a prima facie case of possession.

[39] Section 158(1) of the Criminal Procedure Code ('s 158(1)') provides, inter alia, that any court may alter any charge at any time before judgment is pronounced, see *Public Prosecutor v Oh Keng Seng* [1979] 2 MLJ 174 HC per Ajaib Singh J (later SCJ); and *Public Prosecutor v James Tan* [1983] 2 MLJ 173 per Charles Ho J (as he then was).

[40] Hence, in line with s 158(1) and in the interest of justice, I alter the charge from one of trafficking under s 39B(1)(a) punishable under s 39B(2), to one of possession under s 6 punishable under s 39A(2).

[41] Pursuant to s 158(2), as further explained by the Supreme Court through the judgment of Syed Agil Barakbah SCJ (as he then was) in *Hee Nyuk Fook v Public Prosecutor* [1988] 2 MLJ 360, I now cause the alteration to be read and explained to the accused and ask him to plead thereto under s 159.

[42] The accused has pleaded guilty to the charge as altered. He understood the nature and consequences of his plea. I then explained to the accused that the facts are as found in the evidence adduced, to which he has admitted. Upon accepting his plea, I convicted him on the charge as altered.

[43] In mitigation, learned defence counsel said that the accused was 22 years on the date of the incident. He is a first offender who had pleaded guilty at the first opportunity and so prayed for leniency.

[44] The learned deputy public prosecutor urged the court to pass an appropriate sentence as the offence is serious.

[45] In meting out the proper sentence, I have considered the accused as a first offender, his guilty plea, his age, public interest and the deterrent effect of the sentence. The maximum term of imprisonment under s 39A(2) is 20 years and a minimum of ten strokes of whipping. In the circumstances, I impose a sentence of ten years imprisonment on the accused, with effect from the date of arrest, ie 6 February 2002, and the minimum of ten strokes of whipping.

Order accordingly.

Reported by Brendan Navin Siva